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ABSTRACT

This guide contains the recently revised 1998 Texas procedures concerning dyslexia and related disorders and provides school districts and parents with additional information on the state's dyslexia law and its relationship to the federal laws, Section 540 of the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act. The revised procedures concerning dyslexia outline a process for determining whether students may have reading difficulties and, if so, whether the difficulties may be due to dyslexia. The data gathering and remedial strategies sections contain screening and remediation measures for all types of reading difficulties. The intervention options section describes actions to be taken for students who display common reading difficulties that can be corrected with remedial programs. The section relating to identification and placement describes the first part of the identification and placement process in which specific procedures are implemented to determine whether a student has dyslexia. Information is also provided on testing accommodations for students with reading difficulties for the Texas Assessment of Academic Skills Test. A section containing frequently asked questions and answers about procedures for students with dyslexia and a listing of the dyslexia contact persons follows the overview of the state and federal requirements. (CR)

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ED 432 111

DYSLEXIA AND RELATED DISORDERS

TEXAS STATE LAW, STATE BOARD OF EDUCATION RULE AND THE REVISED PROCEDURES CONCERNING DYSLEXIA

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TEXAS EDUCATION AGENCY
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SEPTEMBER 1998

Foreword

In May 1998 the State Board of Education (SBOE) revised *The Procedures Concerning Dyslexia and Related Disorders*. *The Procedures* serve as guidelines for districts to follow as they provide services to identified students. This document, *Dyslexia and Related Disorders: Texas State Law, State Board of Education Rule, and The Revised Procedures Concerning Dyslexia,* contains the approved *Procedures Concerning Dyslexia and Related Disorders* and provides school districts and parents with additional information regarding the state's dyslexia law and its relationship to the federal laws, Section 504 of the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act (IDEA).

In addition, each education service center has designated a contact person to assist districts and campuses with implementing the state law and SBOE rule related to dyslexia. A section containing frequently asked questions and answers and a listing of the dyslexia contact persons for each of the education service centers follows the overview of the state and federal requirements.

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Commissioner of Education

TEXAS EDUCATION AGENCY

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INTRODUCTION

Students with dyslexia and related disorders may qualify as persons with disabilities under Section 504 of the Rehabilitation Act of 1973. This federal law is a civil rights statute designed to protect qualified persons with disabilities from discrimination in any program that receives federal funding. Although sometimes confused with the Individuals with Disabilities Act (IDEA), formerly the Education of the Handicapped Act (EHA), the law is not an entitlement or funding statute. It does, however, provide certain procedural protections for persons with disabilities to ensure that their needs are met as adequately as are the needs of nondisabled persons. Some students with dyslexia may qualify under IDEA (Special Education); if so, the requirements under IDEA apply.

The interface of Section 504 with the dyslexia guidelines established by the State Board of Education of Texas is crucial. Section 504 requires each school to:

- Conduct an unbiased evaluation of a child who has a disability, has a record of such a disability, or is regarded as having a disability.
- Make placement decisions using a team of persons knowledgeable about the student and the assessment data.
- Offer due process procedures for the resolution of disputes.

The "Revised Procedures Concerning Dyslexia" (a set of guidelines for the implementation of state law), approved by the State Board in May 1998, outlines a process for determining whether students may have reading difficulties and, if so, whether the difficulties may be due to dyslexia.

The Data Gathering and Remedial Strategies sections comprise screening and remediation measures for all types of reading difficulties and are not intended to be specific procedures for identifying dyslexia per se or students suspected of having dyslexia. In addition, these two areas of the process are not intended for use with the student who may have a disability that substantially limits a major life activity such as learning, who has a record of such a disability, or who is regarded as having such a disability. For these students, districts should proceed with the procedures on the Identification and Placement into a Dyslexia Instructional Program or Referral for Special Education Services.

The Data Gathering section describes actions that teachers and school personnel are to take for all students. These actions are good teaching practices which provide assistance to students early, before problems become major.

The Intervention Options section describes actions to be taken for students who display common reading difficulties that can be corrected with remedial programs, employing alternate strategies and techniques. These actions help determine whether the student has

a problem that is *environmental* in nature and can be corrected by ordinary remedial techniques. Use of the actions described in the Remedial Strategies section also helps to rule out cultural or environmental causes of the reading difficulty. Should teachers suspect dyslexia or parents notify the district that their child is suspected of having dyslexia or a related disorder, then Section 504 regulations must be followed for that student at this point in the identification process. The committee of knowledgeable persons should decide the appropriate instructional setting.

Identification and Placement into a Dyslexia Instructional Program describes the first part of the identification and placement process in which specific procedures are implemented to determine whether a student has dyslexia. This is the point of the process at which students may be tested individually. At this point, districts must follow the requirements of Section 504 in the identification, evaluation, and placement process. Those regulations are as follows:

Section 504 of the Rehabilitation Act of 1973 Evaluation Procedures

Districts must establish standards and procedures that ensure that tests and other evaluation materials:

- Have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

- Include material tailored to assess specific areas of educational need and not merely materials that are designed to provide a single general intelligence quotient;

- Are selected and administered so as to ensure that, when a test is given to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level, or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills; and

- Include multiple measures of a student's reading abilities such as informal assessment information (e.g., anecdotal records, lists of books the student has read, audio recordings of the student's oral reading).

Section 504 of the Rehabilitation Act of 1973 Placement Procedures

Decisions about the student's placement and instructional program must be made by a team of persons knowledgeable about the student, the meaning of the evaluation information, and the placement options. Information used to make decisions must come from a variety of sources and may include aptitude and achievement tests, teacher recommendations, and reports on physical/medical condition, social or cultural background, and adaptive behavior. (Adaptive behavior is the effectiveness with which the student meets the standards of personal independence and social responsibility

expected of his or her age and cultural group.) The local district may provide or review a medical diagnosis if this information is needed to make a decision.

A student with dyslexia is considered having a disability under Section 504 of the Rehabilitation Act of 1973 if the condition substantially limits the student's reading activities. The committee of knowledgeable persons must design an appropriate instructional program that meets the individual educational needs of this student with a disability as adequately as the needs of nondisabled students are met. The team must also ensure the inclusiveness of the student with a disability with persons without a disability to the maximum extent appropriate.

Section 504 of the Rehabilitation Act of 1973 Reevaluation Procedures

The district must establish procedures for periodic reevaluation.

Section 504 of the Rehabilitation Act of 1973 Procedural Safeguards

A district must establish a system that includes notification, an opportunity for parents or guardians to examine relevant records, an impartial hearing with opportunity for participation by the parents or guardians and representation by counsel, and a review procedure.

A referral for special education may occur during anytime of the screening and the identification process. If the student's disability is substantial, then a referral for special education services should be made.

TEXAS EDUCATION CODE
(STATE LAW)

§38.003. Screening and Treatment for Dyslexia and Related Disorders

(a) Students enrolling in public schools in this state shall be tested for dyslexia and related disorders at appropriate times in accordance with a program approved by the State Board of Education.

(b) In accordance with the program approved by the State Board of Education, the board of trustees of each school district shall provide for the treatment of any student determined to have dyslexia or a related disorder.

(c) The State Board of Education shall adopt any rules and standards necessary to administer this section.

(d) In this section:

(1) "Dyslexia" means a disorder of constitutional origin manifested by a difficulty in learning to read, write, or spell, despite conventional instruction, adequate intelligence, and sociocultural opportunity.

(2) "Related disorders" includes disorders similar to or related to dyslexia, such as developmental auditory imperception, dysphasia, specific developmental dyslexia, developmental dysgraphia, and developmental spelling disability.

Added by Acts 1995, 74th leg., ch. 260 § 1, eff. May 30, 1995.

TEXAS ADMINISTRATIVE CODE
(STATE BOARD OF EDUCATION RULE)

§74.28. Student with Dyslexia and Related Disorders.

(a) The board of trustees of a school district must ensure that procedures for identifying a student with dyslexia or a related disorder and for providing appropriate instructional services to the student are implemented in the district. These procedures will be monitored by the Texas Education Agency (TEA) with on-site visits conducted as appropriate.

(b) A school district's procedures must be implemented according to the State Board of Education (SBOE) approved strategies for screening, and techniques for treating, dyslexia and related disorders. The strategies and techniques are described in the "Procedures Concerning Dyslexia and Related Disorders," a set of flexible guidelines

for local districts that may be modified by SBOE only with broad-based dialogue that includes input from educators and professionals in the field of reading and dyslexia and related disorders from across the state. Screening should only be done by individuals/professionals who are trained to assess students for dyslexia and related disorders.

(c) A school district may purchase a reading program or develop its own reading program for students with dyslexia and related disorders, as long as the program is characterized by the descriptors found in the "Procedures Concerning Dyslexia and Related Disorders." Teachers who screen and treat these students must be trained in instructional strategies which utilize individualized, intensive, multisensory, phonetic methods and a variety of writing and spelling components described in the "Procedures Concerning Dyslexia and Related Disorders" and in the professional development activities specified by each district and/or campus planning and decision making committee.

(d) Before an identification or assessment procedures is used selectively with an individual student, the school district must notify the student's parent or guardian or another person standing in parental relation to the student.

(e) Parents/guardians of students eligible under the Rehabilitation Act of 1973, §504, must be informed of all services and options available to the student under that federal statute.

(f) Each school must provide each identified student access at his or her campus to the services of a teacher trained in dyslexia and related disorders. The school district may, with the approval of each student's parents or guardians, offer additional services at a centralized location. Such centralized services shall not preclude each student from receiving services at his or her campus.

(g) Because early intervention is critical, a program for early identification, intervention, and support for students with dyslexia and related disorders must be available in each district as outlined in the "Procedures Concerning Dyslexia and Related Disorders."

(h) Each school district may provide a parent education program for parents/guardians of students with dyslexia and related disorders. This program should include: awareness the of characteristics of dyslexia and related disorders; information on testing and diagnosis of dyslexia; information on effective strategies for teaching dyslexic students; and awareness of information on modification, especially modifications allowed on standardized testing.

Revised Procedures Concerning Dyslexia and Related Disorders

(Approved by the State Board of Education, 1998)

Introduction

As defined in Texas Education Code §38.003

(1) "Dyslexia" means a disorder of constitutional origin manifested by a difficulty in learning to read, write, or spell, despite conventional instruction, adequate intelligence, and sociocultural opportunity.

(2) "Related disorders" includes disorders similar to or related to dyslexia such as developmental auditory imperception, dysphasia, specific developmental dyslexia, developmental dysgraphia, and developmental spelling disability.

Characteristics of dyslexia:

The following difficulties may be associated with dyslexia if they are unexpected for the individual's age, educational level, or cognitive abilities:

- difficulty with the development of phonological awareness and phonological processing skills (processing the sounds of speech), including segmenting or breaking spoken words into individual sounds;
- difficulty accurately decoding nonsense or unfamiliar words;
- difficulty reading single words in isolation;
- inaccurate and labored oral reading;
- lack of reading fluency;
- variable degrees of difficulty with reading comprehension;
- variable degrees of difficulty learning the names of letters and their associated sounds;
- difficulty with learning to spell;
- difficulty in word finding and rapid naming;

- variable difficulty with aspects of written composition;
- difficulty with learning and reproducing the alphabet in correct sequence (in either oral or written form); and
- family history of similar problems.

The difficulty of the child identified as having dyslexia is in reading, single-word decoding, reading fluency, reading comprehension, written composition, and spelling. The problems of the child with a learning disorder may include these difficulties and other difficulties that do not necessarily pertain to reading exclusively.

The International Dyslexia Association's definition of dyslexia is:

"Dyslexia is one of several distinct learning disabilities. It is a specific language-based disorder of constitutional origin characterized by difficulties in single-word decoding, usually reflecting insufficient phonological processing. These difficulties in single-word decoding are often unexpected in relation to age and other cognitive and academic abilities; they are not the result of generalized developmental disability or sensory impairment. Dyslexia is manifested by variable difficulty with different forms of language, often including, in addition to problems with reading, a conspicuous problem with acquiring proficiency in writing and spelling." (Working definition of dyslexia approved by the International Dyslexia Association Research Committee, April 1994, in collaboration with individuals from the National Center for Learning Disabilities and the National Institutes of Child Health and Human Development.)

Assessment and Treatment

As stated in Texas Education Code §38.003(a) and (b):

(a) Students enrolling in public schools in this state shall be tested for dyslexia and related disorders at appropriate times in accordance with a program approved by the State Board of Education."

(b) "In accordance with the program approved by the State Board of Education, the board of trustees of each school district shall provide for the treatment of any student determined to have dyslexia or a related disorder."

Data Gathering

If a student is failing to make expected academic progress and exhibits characteristics outlined in "The Revised Procedures Concerning Dyslexia and Related Disorders," data from the sources listed below should be used to make an instructional decision about his or her needs. Data available during the screening and treatment program for dyslexic students include the results of the following that are gathered and are typically found in the student's cumulative folder:

- Vision screening;
- Hearing screening;
- Speech and language screening through a referral process;
- Academic progress reports (report cards);
- Teacher reports of aptitude, behavior, and problems;
- Parent conferences;
- Results of the state student assessment program as described in the Texas Education Code, §39.022;
- Results of testing for limited English proficiency;
- Results of basal reading series assessment;
- Results of the K-2 reading instrument as described in the Texas Education Code, §28.006; and
- Results of accommodations provided by classroom teachers.

If problems in academic achievement have been noted through academic progress reports, parent conferences, or inadequate performance on the state student assessment program as described in the Texas Education Code, §39.022 and §28.006, the school district will evaluate the student's academic progress to determine what actions are needed to ensure improved academic performance.

A referral for testing through special education or a referral for the dyslexia instructional program may be appropriate at this time. However, needed support actions may also include, but are not limited to, obtaining vision or hearing correction, retention, rearrangement of class assignments, supportive counseling, bilingual education, English as a second language, tutoring, or other appropriate program modifications. At any time that a student does not make expected progress, actions in Remedial Strategies or the Identification and Placement into a Dyslexia Instructional Program or Referral for Special Education Services should be considered.

Intervention Options

At this point of the identification process, a decision should be made about placement of the student in the most appropriate intervention (with the least restrictive environment) immediately following data gathering. These appropriate interventions may include Remedial Strategies, the Identification and Placement into a Dyslexia Instructional Program, or Referral for Special Education Services. Parent notification and consent is required should the district choose to conduct an individual evaluation of the student. Listed below are the descriptions of the intervention options for the student experiencing unexpected difficulty with learning to read, write, and/or spell.

Remedial Strategies

From the information obtained from the data collected, it may be determined that specific remedial programming (individualized services) is needed. Assessment procedures prior to the development of appropriate remedial instruction may include, but are not limited to, the following:

- assessment measures to determine decoding and word identification, reading comprehension, writing, and spelling competency and specific related problems; and

- an informal reading inventory to identify specific problems related to reading.

The student would be placed in an appropriate remedial or compensatory program such as bilingual, tutorial, summer school, etc. If a student does not make appropriate progress in a remedial or compensatory program, a referral may be made for services in the Dyslexia Instructional Program or Special Education Services. The parent(s) must be notified that further evaluation is needed.

All remedial reading and compensatory teachers should have instruction in instructional practices and performance monitoring which may be used with students who demonstrate some characteristics of dyslexia but have not been identified as dyslexic.

Identification and Placement into a Dyslexia Instructional Program

If it is determined that a student who has been identified as having primary difficulties in reading, writing, and spelling is not progressing academically in the remedial programs of the school district, then continued evaluation in the areas of dyslexia and related disorders must be considered. Notice of the proposal to identify the child must be issued in accordance with federal regulations. This identification made by the school district's committee of knowledgeable persons entails a review of all accumulated data. This committee must be knowledgeable about the student, knowledgeable about the evaluation, and knowledgeable about the instructional programs available. The identification, as required in the Texas Education Code, §38.003, and the Texas Administrative Code, §74.28, would be determined by:

(1) the student's exhibiting characteristics associated with dyslexia,

(2) the student's unexpected lack of appropriate academic progress,

(3) the student's having adequate intelligence, the ability to learn,

(4) the student's receiving conventional instruction, and

(5) the student's lack of progress not being due to sociocultural factors such as language differences, inconsistent attendance, and lack of experiential background.

Once the identification of dyslexia or a related disorder has been made, the school district shall provide an appropriate instructional program for the student so identified. This instructional program should be offered in a remedial class setting on the identified student's campus. The major instructional strategies should utilize individualized, intensive, multisensory methods, contain writing and spelling components, and that include the following descriptors:

- Graphophonemic knowledge (explicit, synthetic and analytic phonics): instruction which takes advantage of the letter-sound plan in which words which carry meaning are made of sounds, sounds are written with letters in the right order. Students with this understanding can blend sounds associated with letters into words and can separate words into component sounds for spelling and writing.

- Individualized: instruction which meets the specific learning needs of each individual student. A reading program in which both materials and methods are matched to each student's individual ability level.

- Linguistic: instruction directed toward proficiency and fluency with the patterns of language so that words and sentences are the carriers of meaning.

- Meaning based: instruction which is directed toward purposeful reading and writing, with an emphasis on comprehension and composition.

- Multisensory: instruction which incorporates the simultaneous use of two or more sensory pathways (auditory, visual, kinesthetic, tactile) during presentations and practice.

- Phonemic awareness: instruction that enables students to detect, segment, blend, and manipulate sounds in spoken language.

- Process oriented: the processes or strategies students use for decoding, encoding, leading to word recognition, fluency, and comprehension which students need to become independent readers during presentation and practice.

- Language structure: instruction that encompasses morphology, semantics, syntax, and pragmatics.

- Explicit direct instruction: instruction which is systematic (structured), sequential, and cumulative, and is organized and presented in a way that follows a logical sequential plan and fits the nature of language (alphabetic principle), with no assumption of prior skills or language knowledge.

Teachers of these classes shall be prepared to utilize these techniques and strategies. They may also serve as trainers and consultants in the area of dyslexia and related disorders to regular, remedial, and special education teachers.

Referral for Special Education Services

There will be some students with severe dyslexia or related disorders who will be unable to make adequate academic progress within any of the programs described in the Identification and Placement into a Dyslexia Instructional Program. In such cases, a referral to special education for a comprehensive assessment and possible identification as disabled within the meaning of the Individuals with Disabilities Education Act (IDEA) should be made as needed. Such referral would be accompanied by the written general

and specific notices to the parents of federal and state rights for children with disabilities and would follow all mandated procedures.

In IDEA, Amendments of 1997, Section 602 (26), dyslexia is considered one of a variety of etiological foundations for "specific learning disability."

Section 602 (26) SPECIFIC LEARNING DISABILITY.

(A) IN GENERAL--The term "specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.

(B) DISORDERS INCLUDED--This term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(C) DISORDERS NOT INCLUDED--This term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

34 CFR 300.7(b)(10) states:

> "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual disability, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not apply to children who have learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

Certain students with dyslexia or other specific learning disabilities qualify as disabled under federal and state law and may receive special education and related services. The admission, review, and dismissal (ARD) committee may include the descriptors listed in Identification and Placement into a Dyslexia Instructional Program for the student's individual education plan (IEP). Other students with less severe learning disabilities or dyslexia may not require special education services and should benefit from specific assistance within regular or remedial programs.

Glossary of Terms

Adaptive Behavior: is the effectiveness in which the student meets the standards of personal independence and social responsibility expected of his or her age and cultural group.

Development dysgraphia: is characterized by the inability to write legibly. This may or may not occur in addition to other difficulties in written language. Visual-motor coordinating skills are frequently within the average range, and are not the primary cause of dysgraphia.

Developmental spelling disorder: is characterized by significant difficulty learning to spell. This occurs in the absence of reading or other written language difficulties.

Dyslexia: is one of several distinct learning disabilities. It is a specific language-based disorder of constitutional origin characterized by difficulties in single-word decoding, usually reflecting insufficient phonological processing. These difficulties in single word decoding are often unexpected in relation to age and other cognitive and academic abilities; they are not the result of generalized developmental disability or sensory impairment. Dyslexia is manifested by variable difficulty with different forms of language, often including, in addition to problems with reading, a conspicuous problem with acquiring proficiency in writing and spelling. (International Dyslexia Association, 1994). [Note: This definition is not the same definition as in the Texas Education Code §38.003, this is an additional definition for further clarification.]

Explicit direct instruction: instruction which is systematic (structured), sequential, and cumulative, and is organized and presented in a way that follows a logical sequential plan and fits the nature of language (alphabetic principle), with no assumption of prior skills or language knowledge.

Individualized: instruction which meets the specific learning needs of each individual student. A reading program in which both materials and methods are matched to each student's individual ability level.

Graphophonemic knowledge (explicit, synthetic and analytic phonics): instruction which takes advantage of the letter-sound plan in which words which carry meaning are made of sounds, sounds are written with letters in the right order. Students with this understanding can blend sounds associated with letters into words and can separate words into component sounds for spelling and writing. Students should be assessed to determine if they can hear sounds in spoken language prior to letter-sound instruction.

Language structure: instruction that encompasses morphology, semantics, syntax, and pragmatics.

Linguistic: instruction is directed toward proficiency and fluency with patterns of language so that words and sentences are the carriers of meaning.

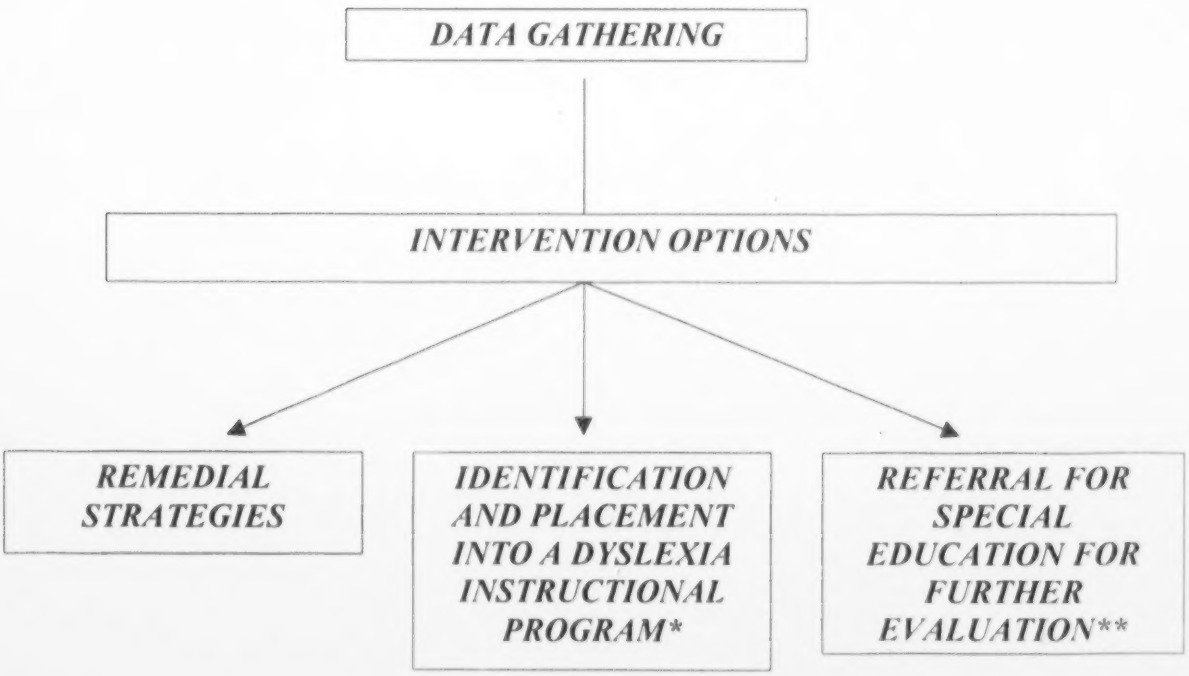
Meaning based: instruction which is directed toward purposeful reading and writing, with an emphasis on comprehension and composition.

Multisensory: is instruction which incorporates the simultaneous use of two or more sensory pathways (auditory, visual, kinesthetic, tactile) during presentations and practice.

Phonemic awareness: instruction that enables students to detect, segment, blend, and manipulate sounds in spoken language.

Process oriented: the processes or strategies students use for decoding, encoding, leading to word recognition, fluency, and comprehension which students need to become independent readers during presentation and practice.

DECISION PROCESS FOR DYSLEXIA IDENTIFICATION, INTERVENTION, AND PLACEMENT


DATA GATHERING
INTERVENTION OPTIONS
REMEDIAL STRATEGIES
IDENTIFICATION AND PLACEMENT INTO A DYSLEXIA INSTRUCTIONAL PROGRAM*
REFERRAL FOR SPECIAL EDUCATION FOR FURTHER EVALUATION**

*A committee of knowledgeable persons makes the decision for this intervention option.

**An Admissions, Review, and Dismissal Committee (ARD) determines services needed.

Testing Accommodations for the State Student Assessment Program

NOTE: Teachers should refer to the current issue of the TAAS Coordinator's Manual for each year's listing of modifications. These modifications may change from time to time.

Test Accommodations

Certain test administration procedures that do not cause test results to be invalid may be used. Information about testing accommodations should be communicated to administrators and other interested individuals. A list of test accommodations has also been included in the test administrator manuals.

The decision to use a particular accommodation with a student should be made on an individual basis and should take into consideration a) the needs of the student, and b) whether the student routinely receives the accommodation in classroom instruction.

Allowable Accommodations

- Instructions given orally before or after the test may be signed to an examinee with a hearing impairment or translated into the native language of an examinee with limited English proficiency.

- The writing prompt may be signed to an examinee with a hearing impairment, but no additional information or explanation may be provided to the student.

- An examinee may place a colored transparency over the test or may use a place marker with the test and the answer document.

- An examinee may receive an individual administration. In this setting, the examinee may read aloud while working or may read the subject area tests into a tape recorder during testing and play the tests back while working. A test administrator must be present in the test room at all times. All tape recordings should be returned in the scorable shipment with any voided materials.

- An examinee may use a braille or large-print version of the test (see Appendix F for instructions and additional accommodations for testing students with visual impairments).

- If an examinee has a disabling condition that interferes with his or her ability to record machine-readable responses, the examinee may respond orally to test items, mark responses in the test booklet, or type responses. The test administrator must record these responses verbatim on a standard answer

document. Administrators should write "Transcribed by (NAME) because (REASON)" at the top of the answer document. Test responses cannot be scored unless they appear on the answer document.

- If an examinee has a disabling condition that interferes with his or her ability to write the composition, an examinee may a) dictate a composition directly to a test administrator, spelling out all words and indicating all capital letters and punctuation marks as the essay is composed, or b) by tape-record the essay while composing it, then play it back for the test administrator, spelling, capitalizing, and punctuating it. Afterward, the examinee must be allowed to read over the composition and indicate where he or she would like to make corrections. The test administrator must record these responses verbatim on a standard answer document. Administrators. should write "Transcribed by (NAME) because (REASON)" at the top of the written composition page. Test responses cannot be scored unless they appear on the answer document. All tape recordings should be returned in the scorable shipment with any voided materials.

- The examinee may type the TAAS written composition on a typewriter or on a computer but may not use the computer's "spell check" feature or save the document. The composition **must** be transcribed onto a regular answer document for scoring. Administrators should write "Transcribed by (NAME) because (REASON)" at the top of the written composition.

Nonallowable Accommodations

- The examinee may not receive any reading assistance on the writing or reading tests. Examinees who are identified as having dyslexia or a related disorder may qualify for an oral administration of the mathematics, Grade 8 social studies, and/or Grade 8 science tests.

- The examinee may not use a calculator.

- The examinee may not use a slide rule.

- The examinee may not use English-language or foreign-language reference materials.

- Test items must not be translated.

- Other accommodations that would make the test invalid are prohibited.

Oral Administration

Eligibility

A test administrator may read aloud the test questions and answer choices for the mathematics, Grade 8 social studies, and/or Grade 8 science tests to:

- eligible TAAS examinees identified as having dyslexia or a related disorder (e.g., dysgraphia, developmental auditory imperception, dysphasia) who regularly receive this accommodation in the classroom; and

- hearing-impaired students whose individual educational plans require the signing of daily instruction.

The oral administration is available only for the mathematics, social studies, and science sections of the TAAS test. It is not available for the reading or writing tests or for the Texas Educational Assessment of Minimum Skills (TEAMS) test.

Decision to Provide

The decision to provide an oral administration to students receiving special education services should be made by the student's admission, review, and dismissal (ARD) committee. For students not in special education, this determination rests with the committee that is required by Section 504 of the Rehabilitation Act of 1973 for making the student's placement decisions. Directions for the oral administration are in Appendix B.

> If you have questions about accommodations that are not listed in this manual, please call the Student Assessment Division at (512) 463-9536.

Questions and Answers

The following questions and answers relate to various topics important to dyslexia and related disorders.

Relationship of Dyslexia Program To Section 504

1 How does Section 504 of the federal law affect the way school districts implement the state dyslexia law and the State Board of Education rule?

- If a student is suspected of having a disability within the scope of Individuals with Disabilities Education Act (IDEA), then all special education procedures must be followed. If this is done and the student is determined as having a disability under IDEA, the requirements of Section 504 will be met.

- If a student is not suspected of having a disability within the scope of IDEA, he or she may still have a disability within the scope of Section 504. Such students must be evaluated, placed, and provided an education that meets the individual needs of the student as adequately as the needs of students without disabilities are served in the district. At times, such nondiscrimination requires the provision of special services or modifications of programs to enable the student to benefit from the education which is offered to him or her. (The most familiar example is the provision of a ramp for students using wheelchairs.) Following the dyslexia guidelines will assure attention to the special problems of students with dyslexia who are considered disabled under Section 504. Particular attention must be paid to the procedural and appeal provisions of Section 504.

Only the Identification and Placement into a Dyslexia Instructional Program and Referral for Special Education Services options single out students for individualized testing and evaluation. Procedures in the Identification and Placement into a Dyslexia Instructional Program section must be carried out within the requirements of Section 504 including notification of parents, opportunity for parents to examine relevant records, evaluation using validated tests (with parental consent), and placement by a team of persons knowledgeable about the student and about the meaning of the evaluation data and

placement options. The steps taken to ensure compliance with Section 504 should be documented in writing. Procedures in the Referral for Special Education Services section must be carried out under the requirements of IDEA.

2 Is every student suspected of having dyslexia disabled within the meaning of Section 504?

No, not in all cases. To be a person with a disability within the meaning of the statute, the student's disability must substantially limit a major life activity, the student must have a record of such a disability, or the student must be regarded as having such disability. The code of federal regulations lists nine major life activities that may be affected: caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working [34CFR 104.3(j)]. Thus a student who is performing adequately in the classroom and in school generally and does not have any other major interference with his or her life activities is not considered disabled under Section 504. When a student experiences serious difficulty in reading, then school personnel are to follow the "Revised Procedures Concerning Dyslexia and Related Disorders." In some cases, the student may be regarded as having a disability within the meaning of Section 504.

3 Do all students need to go through the intervention options sequentially?

Students do not have to go through the intervention options sequentially. If a student exhibits characteristics associated with dyslexia, that student does not have to fail a subject or fall behind in order to be evaluated for dyslexia (or for special education, for that matter).

4 How long must students spend in each intervention option of the "Revised Procedures Concerning Dyslexia and Related Disorders?"

Staff must be sensitive to the amount of time spent by students in each intervention option of the "Revised Procedures Concerning Dyslexia and Related Disorders" and provide ongoing assessment and reevaluation. Students should not spend unreasonable amounts of time receiving remedial strategies if they need a referral for identification and placement into a dyslexia instructional program.

5 Must each district provide an instructional program for students identified as having dyslexia at each grade level through Grade 12?

Yes. The "Revised Procedures Concerning Dyslexia and Related Disorders" must be implemented at all grade levels.

6 What written documentation is recommended to ensure compliance with Section 504?

The following are recommended to be documented in writing in the event that an Office for Civil Rights investigation be initiated by a formal complaint:

- documentation that the notice of evaluation has been given to parents;
- documentation of the evaluation data;
- documentation of the decisions made by the committee of knowledgeable persons concerning the disability (whether or not a disability exists); and
- documentation of the placement options and placement decisions.

7 What procedural protections are provided to parents who may not agree with the decisions made by a district?

- If the student is suspected of having a disability within the scope of IDEA, the procedural protections provided for in that law and the rules for implementation apply.
- If the student is not suspected of having a disability within the scope of IDEA, then the procedural protections of Section 504 may apply. Under Section 504, parents may file a request for a hearing with the school district. The school district must appoint as an impartial hearing officer a person who is not connected in any way to the district. At the hearing, there must be opportunity for participation by the parents and, if desired, by counsel for the parents. Decisions of the hearing officer may be appealed to the court system.

8 What is the difference between the State Board of Education's procedures and its rule?

The State Board of Education rule requires school districts to follow the "Revised Procedures Concerning Dyslexia and Related Disorders." The Procedures are flexible guidelines developed to assist districts in complying with state and federal laws.

9 What are the school districts' responsibilities in implementing the state dyslexia law?

School districts must collect pertinent data on each enrolled student suspected of having dyslexia or a related disorder. Parents must be notified when a problem is suspected; at the same time, they must be notified of the procedural safeguards (due process). A team of persons knowledgeable about the student, the assessment data, and the placement options must evaluate the data and provide appropriate services for the student in an appropriate instructional program on his/her campus.

If a student is suspected of having a more severe disability, that student must be referred to special education for possible evaluation.

A parent or a physician may have determined that the student has dyslexia or a related disorder. The district may consider the information provided by the parent or physician; however, the district is ultimately responsible for identification.

10 What monies may be used to support the dyslexia program?

State foundation funds, compensatory funds, or local funds are to be used. For students whose disability warrants special education services, special education funds may be used.

Data Gathering

11 What kinds of data about students should school districts collect to comply with the State Board of Education rule?

The data to be collected are the information that schools normally gather. They may include the following:

- vision and hearing screening;
- academic progress reports;
- teacher reports of aptitude and behavior;
- parent conferences;
- results from the state student assessment program as described in the Texas Education Code (TEC) §39.022 and §28.006;
- basal reading assessment;
- speech and language screening;* and
- reading and writing portfolios (folders including samples of student writing, lists of books read, audio tapes of oral reading, formal assessment, teacher observation, etc.).

The above data collected on all students and can be used to determine if a student needs individual assessment required in the Identification and Placement section of the "Revised Procedures Concerning Dyslexia and Related Disorders."

12 What types of assessment are required to satisfy Section 504 regulations in identifying students with dyslexia?

Each district must establish assessment procedures that comply with regulations in Section 104.35. Specifically, tests and other evaluation materials must:

*Not for all students. Such screenings are to be given through a special education referral process if deemed necessary.

- have been validated for the specific purpose for which they are used, and be administered by trained personnel in conformance with instructions provided by their producer;

- include materials tailored to assess specific areas of educational need and not merely materials that are designed to provide a single general intelligence quotient;

- be selected and administered so as to ensure that, when a test is given to a student with impaired sensory, manual, or speaking skills, the test reflects accurately the student's aptitude or achievement level, or whatever other factor the test purports to measure, rather than the student's impaired sensory, manual, or speaking skills; and

- may include informal assessment information such as teacher observation, parent reports, and informal reading inventories.

In addition, evaluation data must provide information from a wide variety of sources, which may include aptitude and achievement tests, teacher recommendations, assessment of physical condition, social or cultural background, and adaptive behavior.

Although individual district procedures will vary, many districts have available much of the required evaluation data for an initial screening without having to perform additional testing. If evaluation data are not current, however, new information may need to be obtained.

13 Is it necessary to record assessment results and data collected on special forms?

No, this sort of information is usually recorded in students' cumulative folders. Districts do not have to change their normal methods of recording students' data. Nor does the state require special forms to record evaluation results. It is important that school districts keep this information in writing, should the Office for Civil Rights investigate a formal complaint.

14 If students do not make expected academic progress in Grade 1, should they be evaluated for dyslexia services?

Not in all cases. It could be that the student has not had the breadth of enhanced language and literacy experiences required to progress at the same rate as his or her classmates. The student may need tutoring, placement in smaller classes, or groups, bilingual or English as a Second Language classes or counseling. Teachers should consider the results of the early reading diagnostic instruments are required by the Texas

Education Code §28.006. If a student does not progress, he or she may need to be provided remedial, compensatory, or dyslexia services.

The student must be allowed the opportunity to develop cognitively before being given any kind of label that may follow him or her throughout school.

15 At what grade level does the data gathering process begin?

It is recommended that priority be given to Grades 1, 2, and 3 to focus on early intervention. However, when a student fails to make expected academic progress at any grade level, the needs of a student should be analyzed and evaluated.

COMMITTEE OF KNOWLEDGEABLE PERSONS

16 What are the responsibilities of the committee of knowledgeable persons?

- The committee must ensure that a program is (or programs are) available for all students identified as having dyslexia or related disorders on his or her campus.
- The committee must ensure that a committee of professionals is responsible for evaluating the data to identify and provide for students with dyslexia and related disorders who are disabled under the definition of Section 504. This may be a committee (or committees) at the district level or at the campus level.
- The committee must ensure that the State Board of Education's guidelines in the "Revised Procedures Concerning Dyslexia and Related Disorders" are being followed.
- The committee coordinates identification and placement with the Language Proficiency Assessment Committees (LPACs) as needed.

17 Who ultimately identifies the student as dyslexic and makes the placement decision?

The identification must be made by the school district's dyslexia committee (committee of knowledgeable persons). This team should include two or more of the following individuals: the superintendent, a principal, a counselor, a consultant, reading specialist,

dyslexia specialist, speech and language pathologist, educational diagnostician, special education teacher, a teacher or other professional educator. The team must be knowledgeable about reading, about the dyslexia program and guidelines, about the student being evaluated, about the assessment procedures and data, and about the placement options available. In addition, it is suggested that the student's parent(s) also be a part of this process.

18 Should each campus have a dyslexia program?

Yes. This in accordance with the State Board of Education rule 19 TAC §74.28.

19 What information should be reviewed?

The team should review information in the student's school records or cumulative folder, data from teachers and parents, and any additional information as needed. (See question 11.)

20 Should additional information be considered, if available? For example, can a physician or a private diagnostician identify a student as having dyslexia or a related disorder?

Yes. A district should consider all information available on a student. Ultimately, however, the school district's dyslexia team must take responsibility for identification. The guidelines listed in the "Revised Procedures Concerning Dyslexia and Related Disorders" must be followed.

21 What kind of test can be used to determine adequate intelligence, and is there a cutoff score to determine adequate intelligence?

Any individually administered standardized intelligence test may be used, but it is not required. Any reasonable, proven assessment of intelligence, such as a test of listening comprehension, may be considered.

There is no cutoff score to determine adequate intelligence. Adequate intelligence will be determined by the policies of the district.

22 Is it necessary to use an individually administered intelligence test to admit a student into a program for students with dyslexia and related disorders?

No. If the dyslexia committee determines that the student has adequate intelligence based on the information collected, then it is not necessary to administer a test of intelligence. Documentation of the determination of adequate intelligence must be maintained.

23 What factors must be considered by the dyslexia committee before placing a student into a dyslexia program?

Identification must be determined based on the following:

- The student has not made academic progress commensurate with potential.
- The student has the characteristics of dyslexia or a related disorder.
- The student has adequate intelligence.

The following factors must NOT be used independently to identify a student for a dyslexia program:

- The student's primary language is not English.
- The student has inconsistent attendance.
- The student lacks experiential background.
- The student has had a brain injury, disease, or surgery.

24 When may a student be referred for special education evaluation?

A student may be referred for special education evaluation at any time a disability is suspected. The dyslexia instructional program is not meant to take the place of special education services. Some students of limited English proficiency are also dyslexic and may need both programs (bilingual education programs/ESL programs and/or special education or the dyslexia instructional program).

25 What is the difference between the general education program and special education program?

The Identification and Placement section of the "Revised Procedures Concerning Dyslexia and Related Disorders" describes the program that must be in place to serve identified students in the general education program. Students who qualify for special education services will have an individual education plan (IEP) developed by the admission, review, and dismissal (ARD) committee. The IEP may include some of the descriptors found in the Identification/Placement into a Dyslexia Instructional Program section of the Procedures.

26 When is a student who is having problems in reading to be considered for placement in an instructional program for dyslexia and related disorders?

If the student is not progressing in the general, remedial, and/or compensatory programs in the school district, and other causes have been eliminated, the student should be evaluated to determine if he or she has dyslexia or a related disorder.

27 Should parents be notified if a district is planning to evaluate a student for dyslexia or a related disorder?

Yes, notice of the proposal to identify the student must be given to the parents prior to any evaluation. Parental consent for testing is necessary before testing begins. In addition, notice of due process rights must be provided to parents at this time.

28 How long should a student remain in a remedial program or in an instructional program designed for students with dyslexia and related disorders?

The local district should, as with any alternative program, establish criteria for exit. Even after exit, the student may require some continuing supports in the general program to be successful. Under Section 504, the district must provide those supports or related aids and services.

29 Is there one test that can be used to determine that a student has dyslexia or related disorders?

There is no one test that a district can use. Each district should use multiple data sources and select both formal and informal assessment measures that are best suited for determining dyslexia and related disorders.

TEACHER TRAINING

30 What certification should teachers of students with dyslexia and related disorders have?

They need valid elementary teaching certificates if they are assigned to teach elementary students and valid secondary certificates if they are to teach secondary students. Teachers with coursework in the areas of reading and reading disabilities should be considered first for assignment to teach students with dyslexia and related disorders. These teachers should be trained to deliver instruction that is described in the "Revised Procedures Concerning Dyslexia and Related Disorders."

IDENTIFICATION OF STUDENTS

31 Should all students be reviewed for dyslexia?

While all students' reading progress should be monitored, only students suspected of having dyslexia or related disorders should be referred for possible evaluation, identification, and placement. Referrals for evaluation may be initiated by parents, teachers, counselors, or a team of knowledgeable persons.

33 May a parent refer a student?

Yes, parents may request to have their student evaluated for dyslexia or a related disorder. The district may use information provided by the parent; however, ultimately the district must identify the student as having dyslexia or a related disorder. Should parents disagree with the results of the district's evaluation, they have a right to due process under Section 504 Rehabilitation Act of 1973. (See question 17)

34 Must a student fail a class or subject before being referred?

No. When the student is not progressing and the teacher has exhausted alternative strategies for instruction in the regular classroom, the student should be considered for an alternative program (e.g., Title 1, compensatory education) or for a dyslexia program.

35 To whom should the student be referred if there is a problem with speech or language development?

The normal special education referral procedures should be followed. For students identified as disabled under IDEA, a speech pathologist usually provides services for students with identified language/speech problems in accordance with the decisions of the admission, review, and dismissal committee.

36 What must school districts provide for students who receive special education services?

School districts must ensure that students who participate in special education services are not denied access to programs on the basis of their disability. To the extent appropriate, the student must be educated in the least restrictive setting with non-disabled peers and have instruction that enables the student to participate and progress in the general curriculum. This means that students who are eligible for special education who also meet Texas identification criteria for dyslexia and related disorders:

- Must have an individual education plan (IEP) that provides access to instructional programs in reading and written language that comply with the State Board of Education rules and Procedures Concerning Dyslexia and Related disorders;
- May not be denied access to the district's programs for students with dyslexia, unless the admission, review, and dismissal (ARD) committee determines such a program would deny the student a free appropriate public education (FAPE) and educational benefit; and
- Must have the admission, review, and dismissal (ARD) committee consider the range of services available for students with dyslexia, in determining the least restrictive educational placement for the student.

For more information about state dyslexia regulations, contact:

Dr. Sharon O'Neal
Director of English Language Arts and Reading
Texas Education Agency
Division of Curriculum and Professional Development
(512) 463-4314

For more information regarding Section 504 of the Rehabilitation Act of 1973, contact:

The Office for Civil Rights
Dallas Regional Office
1999 Bryan, Suite 2600
Dallas, TX 75201
(214) 880-2459

Appendix/Resources

Dyslexia Network Toll Free Information Number: (800) 232-3030, ext. 1454, 1410 or 1490
Jo Polk (972) 348-1454
Helen Macik (972) 348-1410
Cindy Hipes (972) 348-1490

Education Service Center Dyslexia Contacts

Region I
Kathy Campbell or Nelda Garza
1900 W. Schunior
Edinburg, TX 78539
Phone: (956) 984-6000
Fax: (956) 984-6159

Region II
Linn Harkrider
209 N. Water St.
Corpus Christi, TX 78401
Phone: (512) 883-9288, ext. 2116
Fax: (512) 883-3442

Region III
Andrea Wise
1905 Leary Lane
Victoria, TX 77901
Phone: (512) 573-0731
Fax: (512) 576-4804

Region IV
Debby Nixon
7145 W. Tidwell Rd.
Houston, TX 77092
Phone: (713) 744-6310
Fax: (713) 744-6522

Region V
Dorothy Gray
2295 Delaware St.
Beaumont, TX 77703-4299
Phone: (409) 654-6474
Fax: (409) 833-9755

Region VI
Gene Jolly
3332 Montgomery Rd.
Huntsville, TX 77340
Phone: (409) 435-2132
Fax: (409) 295-1447

Region VII
Chris Little
P.O. Box 1622
Kilgore, TX 75663
Phone: (903) 983-2773, ext. 403
Fax: (903) 983-3170

Region VIII
Gwen Smith or Becky Carmickle
P.O. Box 1894
Mt. Pleasant, TX 75456-1894
Phone: (903) 572-8551
Fax: (903) 575-2712

Region IX
Kris Reid
301 Loop 11
Wichita Falls, TX 76305
Phone: (940) 322-6928, ext.129
Fax: (940) 767-3836

Region X
Jo Polk
400 E. Spring Valley Rd.
Richardson, TX 75083-1300
Phone: (972) 348-1454
Fax: (972) 231-2977

Helen Macik
Same address & fax number
Phone: (972) 348-1410

Cindy Hipes
Same address & fax number
Phone: (972) 348-1490

Region XI
Bettye Kuehler
3001 North Freeway
Fort Worth, TX 76106
Phone: (817) 740-3619
Fax: (817) 740-3627

Region XII
Charla Rudd
2101 W. Loop 340
Waco, TX 76702-3409
Phone: (254) 666-0707
Fax: (254) 666-0823

Region XIII
Mari Lester
5701 Springdale Rd.
Austin, TX 78723
Phone: (512) 919-5324
Fax: (512) 919-5437

Region XIV
Susan Anderson
1850 State Hwy. 351
Abilene, TX 79601
Phone: (915) 675-8674
Fax: (915) 675-8659

Region XV
Jody Johnson or Mary Dell Donelson
P.O. Box 5199
San Angelo, TX 76902
Phone: (915) 658-6571
Fax: (915) 658-6571

Region XVI
Wanda Doughten
P.O. Box 30600
Amarillo, TX 79120
Phone: (806) 376-5521, ext. 376
Fax: (806) 373-3432

Region XVII
Debra Gafford
1111 W. Loop 289
Lubbock, TX 79416
Phone: (806) 792-5468, ext. 877
Fax: (806) 792-4545

Maria Gamble
Same address
Phone: (806) 792-4000
Fax: (806) 792-1523

Region XVIII
Carolyn Johnson
P.O. Box 60580
Midland, TX 79711-0580
Phone: (915) 567-3234
Fax: (915) 567-3290

Region XIX
Margaret Moulton
6611 Boeing Dr.
El Paso, TX 79925
Phone: (915) 780-6542
Fax: (915) 780-6537

Region XX
Lynnie Bunten
1314 Hines Ave.
San Antonio, TX 78208
Phone: (210) 370-5441
Fax: (210) 370-5753

Organizations

Academic Language Therapy Association
4020 McEwen, Suite 105
Dallas, TX 75244-5041
(972) 233-9107

Department of Pediatrics/University of Texas at Houston
Center for Academic and Reading Skills
7000 Fannin, 24th Floor
Houston, TX 77030
(713) 500-3686

EDMAR Educational Associates
P.O. Box 2
Forney, TX 75126
(972) 564-5005

International Reading Association
800 Barksdale Rd.
P.O. Box 8139
Newark, DE 19714-8139
(800) 336-READ

Learning Disabilities Association of Texas
1011 West 31st St.
Austin, TX 78705
(512) 458-8234
(800) 604-7500 (For Texas residents only)

Literacy Education & Academic Development, Inc. (LEAD)
P.O. Box 262
Argyle, TX 76226
(940) 464-3752

Neuhaus Education Center
4433 Bissonnet
Bellaire, TX 77401
(713) 664-7676

Scottish Rite Learning Center of West Texas
P.O. Box 10135
Lubbock, TX 79408
(806) 765-9150

Southern Methodist University Learning Therapy
P.O. Box 750384
Dallas, TX 75275-0384
(214) 768-7323

Southwest Multisensory Training Center
9550 Forest Lane, Suite 600
Dallas, TX 75243
(214) 349-7272

Texas Council for Exceptional Children
P.O. Box 1182
Kilgore, TX 75663
(903) 983-1441

Texas International Dyslexia Association (IDA) branches: Austin, Dallas, and Houston
(Call for addresses/numbers)
Diane Newton
1910 Wanda Way
Arlington, TX 76001
(817) 467-6354

Texas Scottish Rite Hospital for Children
2222 Welborn St.
Dallas, TX 75219
(214) 559-7800

Texas State Reading Association
P.O. Box 4396
Austin, TX 78765-4396
(800) 326-5274

James P. Williams Memorial Foundation
515 W. Harris Ave., Suite 104
San Angelo, TX 76903
(915) 655-2331

Note: This is **not** a TEA approved list but is intended to be additional sources for information about dyslexia and related disorders.

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Section 504 Rehabilitation Act of 1973
(Federal Law)

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§104.61 Procedures.

APPENDIX A TO PART 104--ANALYSIS OF FINAL REGULATION
APPENDIX B TO PART 104--GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS [NOTE]

AUTHORITY: 20 U.S.C. 1405; 29 U.S.C. 794.

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Subpart A--General Provisions

§104.1 Purpose.

The purpose of this part is to effectuate Section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§104.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Education and to each program or activity that receives or benefits from such assistance.

§104.3 Definitions.

As used in this part, the term:

(a) *The Act* means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.

(b) *Section 504* means Section 504 of the Act.

(c) *Education of the Handicapped Act* means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94-142, 20 U.S.C. 1401 et seq.

(d) *Department* means the Department of Education.

(e) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department of Education.

(f) *Recipient* means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) *Applicant for assistance* means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) *Federal financial assistance* means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) *Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) *Handicapped person.* (1) "Handicapped person" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) *Physical or mental impairment* means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) *Is regarded as having an impairment* means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) *Qualified handicapped person* means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool, elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to

whom a state is required to provide a free appropriate public education under Section 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(l) *Handicap* means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

§104.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination, under any program or activity which receives or benefits from Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1)A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Programs limited by Federal law.* The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute

or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

§104.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Assistant Secretary, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which, it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Assistant Secretary may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

§104.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of handicap in violation of Section 504 or this part, the recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of Section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Assistant Secretary, where appropriate, may require either or both recipients to take remedial action.

(3) The Assistant Secretary may, where necessary to overcome the effects of discrimination in violation of Section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Assistant Secretary upon request: (i) A list of the interested persons consulted (ii) a description of areas examined and any problems identified, and (iii) a description of any modifications made and of any remedial steps taken.

§104.7 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

§104.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of Section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to 104.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§104.9 Administrative requirements for small recipients.

The Assistant Secretary may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with 104.7 and 104.8, in whole or in part, when the Assistant Secretary finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§104.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are

or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B--Employment Practices

§104.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs assisted under that Act.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

§104.12 Responsible accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include: (1) Making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§104.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) The test score or other selection criterion, as used by the recipient, is shown to be

job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§104.14 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to 104.6(a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to 104.6(b), or when a recipient is taking affirmative action pursuant to section 503 or the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, *Provided, That*:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided, That*: (1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirements of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

Subpart C--Program Accessibility

§104.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§104.22 Existing facilities.

(a) *Program accessibility*. A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods*. A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate

accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of 104.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(c) *Small health, welfare, or other social service providers.* If a recipient with fewer than fifteen employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

(d) *Time period.* A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(e) *Transition plan.* In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period of the transition plan is longer than one year, identify the steps that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(f) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

§104.23 New construction.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *Conformance with Uniform Federal Accessibility Standards.* (1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with Sections 3-8 of the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR subpart 101-19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, Section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without

removing or altering a load-bearing structural member.

[45 FR 30936, May 9, 1980; 45 FR 37426, June 3, 1980; 55 FR 52138, 52141, Dec. 19, 1990]

Subpart D--Preschool, Elementary, and Secondary Education

§104.31 Application of this subpart.

Subpart D applies to preschool, elementary, secondary, and adult education programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§104.32 Location and notification.

A recipient that operates a public elementary or secondary education program shall annually:

(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

§104.33 Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36.

(2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person in or refer such person to a program other than the one that it operates as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

(c) *Free education.* (1) General. For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) *Transportation.* If a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the program is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the program operated by the recipient.

(3) *Residential placement.* If placement in a public or private residential program is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the program, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

(4) *Placement of handicapped persons by parents.* If a recipient has made available, in conformance with the requirements of this section and 104.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made such a program available or

otherwise regarding the question of financial responsibility are subject to the due process procedures of 104.36.

(d) *Compliance.* A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

§104.34 Educational setting.

(a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in 104.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) *Comparable facilities.* If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services and activities of the recipient.

§104.35 Evaluation and placement.

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

(b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with 104.34.

(d) *Reevaluation.* A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the

Education for the Handicapped Act is one means of meeting this requirement.

§104.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of Section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

§104.37 Nonacademic services.

(a) *General.* (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) *Counseling services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicappped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of 104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

§104.38 Preschool and adult education programs.

A recipient to which this subpart applies that operates a preschool education or day care program or activity or an adult education program or activity may not, on the basis of handicap, exclude qualified handicapped persons from the program or activity and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program or activity.

§104.39 Private education programs.

(a) A recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided an appropriate education, as defined in 104.33(b)(1), within the recipient's program.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that operates special education programs shall operate such programs in accordance with the provisions of 104.35 and 104.36. Each recipient to which this section applies is subject to the provisions of 104.34, 104.37, and 104.38.

APPENDIX A TO PART 104--ANALYSIS OF FINAL REGULATION

SUBPART A--GENERAL PROVISIONS

Definitions. 1. *Recipient* Section 104.23 contains definitions used throughout the regulation.

One comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's regulations implementing Title VI and Title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of 104.4(b)(iv), which prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

2. *Federal financial assistance.* In 104.3(h), defining federal financial assistance, a clarifying change has been made: procurement contracts are specifically excluded. They are covered, however, by the Department of Labor's regulation under Section 503. The Department has never considered such contracts of assistance; the explicit exemption has been added only to avoid possible confusion.

The proposed regulation's exemption of contracts of insurance or guaranty has been retained. A number of comments argued for its deletion on the ground that Section 504, unlike Title VI and Title IX, contains no statutory exemption for such contracts. There is no indication, however, in the legislative history of the Rehabilitation Act of 1973 or of the amendments to that Act in 1974, that Congress intended Section 504 to have a broader application, in terms of federal financial assistance, than other civil rights statutes. Indeed, Congress directed that Section 504 be implemented in the same manner as Titles VI and IX. In view of the long established exemption of contracts of insurance or guaranty under Title VI, we think it unlikely that Congress intended Section 504 to apply to such contracts.

3. *Handicapped person.* Section 104.3(j), which defines the class of persons protected under the regulation, has not been substantially changed. The definition of handicapped person in paragraph (j)(1) conforms to the statutory definition of handicapped person that is applicable to Section 504, as set forth in Section 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. 93-516.

The first of the three parts of the statutory and regulatory definition includes any person who has a physical or mental impairment that substantially limits one or more major life activities. Paragraph (j)(2)(i) further defines physical or mental impairments. The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and, as discussed below, drug addiction and alcoholism.

It should be emphasized that a physical or mental impairment does not constitute a handicap for purposes of Section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities. Several comments observed the lack of any definition in the proposed regulation of the phase "substantially limits." The Department does not believe that a definition of this term is possible at this time.

A related issue raised by several comments is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways. The most common recommendation was that only "traditional" handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps. The Department intends, however, to give particular attention in its enforcement of Section 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.

The definition of handicapped person also includes specific limitations on what persons are classified as handicapped under the regulation. The first of the three parts of the definition specifies that only physical and mental handicaps are included. Thus, environmental, cultural, and economic disadvantage are not in themselves covered; nor are prison records, age, or homosexuality. Of course, if a person who has

any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped person.

In paragraph (j)(2)(i), physical or mental impairment is defined to include, among other impairments, specific learning disabilities. The Department will interpret the term as it is used in Section 602 of the Education of the Handicapped Act, as amended. Paragraph (15) of Section 602 uses the term "specific learning disabilities" to describe such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Paragraph (j)(2)(i) has been shortened, but not substantively changed, by the deletion of clause (C), which made explicit the inclusion of any condition which is mental or physical but whose precise nature is not at present known. Clauses (A) and (B) clearly comprehend such conditions.

The second part of the statutory and regulatory definition of handicapped person includes any person who has a record of a physical or mental impairment that substantially limits a major life activity. Under the definition of "record" in paragraph (j)(2)(iii), persons who have a history of a handicapping condition but no longer have the condition, as well as persons who have been incorrectly classified as having such a condition, are protected from discrimination under Section 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as mentally retarded.

The third part of the statutory and regulatory definition of handicapped person includes any person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities. It includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition, such as persons with a limp. This part of the definition also includes some persons who might not ordinarily be considered handicapped, such as persons with disfiguring scars, as well as persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped.

4. Drug addicts and alcoholics. As was the case during the first comment period, the issue of whether to include drug addicts and alcoholics within the definition of handicapped person was of major concern to many commenters. The arguments presented on each side of the issue were similar during the two comment periods, as was the preference of commenters for exclusion of this group of persons. While some comments reflected misconceptions about the implications of including alcoholics and drug addicts within the scope of the regulation, the Secretary understands the concerns that underlie the comments on this question and recognizes that application of Section 504 to active alcoholics and drug addicts presents sensitive and difficult questions that must be taken into account in interpretation and enforcement.

The Secretary has carefully examined the issue and has obtained a legal opinion from the Attorney General. That opinion concludes that drug addiction and alcoholism are "physical or mental impairments" within the meaning of Section 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for purposes of Section 504 if their impairment substantially limits one of their major life activities. The Secretary therefore believes that he is without authority to exclude these conditions from the definition. There is a medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily mental or physical. In addition, while Congress did not focus specifically on the problems of drug addiction and alcoholism in enacting Section 504, the committees that considered the Rehabilitation Act of 1973 were made aware of the Department's long-standing practice of treating addicts and alcoholics as handicapped individuals eligible for rehabilitation services under the Vocational Rehabilitation Act.

The Secretary wishes to reassure recipients that inclusion of addicts and alcoholics within the scope of the regulation will not lead to the consequences feared by many commenters. It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons sorely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related

to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition, may be taken into account in determining whether he or she is qualified.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider--for all applicants including drug addicts and alcoholics--past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce rules prohibiting the possession or use of alcohol or drugs in the work place, provided that such rules are enforced against all employees.

With respect to other services, the implications of coverage, of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students.

Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.

5. *Qualified handicapped person.* Paragraph (k) of 104.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

Section 104.3(k)(1) defines a qualified handicapped person with respect to employment as a handicapped person who can, with reasonable accommodation, perform the essential functions of the job in question. The term "essential functions" does not appear in the corresponding provision of the Department of Labor's Section 503 regulation, and a few commenters objected to its inclusion on the ground that a handicapped person should be able to perform all job tasks. However, the Department believes that inclusion of the phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job. Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition.

Certain commenters urged that the definition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular mental or physical characteristic is essential. Because the same result is achieved by the requirement contained in paragraph (a) of 104.13, which requires an employer to establish that any selection criterion that tends to screen out handicapped persons is job-related, that recommendation has not been followed.

Section 104.3(k)(2) defines qualified handicapped person, with respect to preschool, elementary, and secondary programs, in terms of age. Several commenters recommended that eligibility for the services be based upon the standard of substantial benefit, rather than age, because of the need of many handicapped children for early or extended services if they are to have an equal opportunity to benefit from education programs. No change has been made in this provision, again because of the extreme

difficulties in administration that would result from the choice of the former standard. Under the remedial action provisions of 104.6(a)(3), however, persons beyond the age limits prescribed in 104.3(k)(2) may in appropriate cases be required to be provided services that they were formerly denied because of a recipient's violation of Section 504.

Section 104.3(k)(2) states that a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services or at which State law mandates the provision of educational services to handicapped persons. In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of the Handicapped Act--generally, 3-18 as of September 1978, and 3-21 as of September 1980 are incorporated by reference in this paragraph.

Section 104.3(k)(3) defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must be met by applicants to these programs. The term technical standards refer to all nonacademic admissions criteria that are essential to participation in the program in question.

6. *General prohibitions against discrimination.* Section 104.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department.

Paragraph (b)(1)(i) prohibits the exclusion of qualified handicapped persons from aids, benefits, or services, and paragraph (ii) requires that equal opportunity to participate or benefit be provided. Paragraph (iii) requires that services provided to handicapped persons be as effective as those provided to the nonhandicapped. In paragraph (iv), different or separate services are prohibited except when necessary to provide equally effective benefits.

In this context, the term *equally effective*, defined in paragraph (b)(2), is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. This standard parallels the one established under Title VI of the Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See Lau v. Nichols, 414 U.S. 563 (1974). To be equally effective, however, an aid, benefit, or service need not produce equal results; it merely must afford an equal opportunity to achieve equal results.

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b)(2) of the phrase "in the most integrated setting appropriated to the person's needs" is intended to reinforce this general concept. A new paragraph (b)(3) has also been added to 104.4, requiring recipients to give qualified handicapped persons the option of participating in regular programs despite the existence of permissibly separate or different programs. The requirement has been reiterated in 104.38 and 104.47 in connection with physical education and athletics programs.

Section 104.4(b)(1)(v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself. Paragraph (b)(1)(vi) was added in response to comment in order to make explicit the prohibition against denying qualified handicapped persons the opportunity to serve on planning and advisory boards responsible for guiding federally assisted programs or activities.

Several comments appeared to interpret 104.4(b)(5), which proscribes discriminatory site selection, to prohibit a recipient that is located on hilly terrain from erecting any new buildings at its present site. That, of course, is not the case. This paragraph is not intended to apply to construction of additional buildings at an existing site. Of course, any such facilities must be made accessible in accordance with the requirements of 104.23.

7. *Assurances of compliance.* Section 104.5(a) requires a recipient to submit to the Assistant Secretary an assurance that each of its programs

and activities receiving or benefiting from Federal financial assistance from this Department will be conducted in compliance with this regulation. Many commenters also sought relief from the paperwork requirements imposed by the Department's enforcement of its various civil rights responsibilities by requesting the Department to issue one form incorporating Title VI, Title IX, and Section 504 assurances. The Secretary is sympathetic to this request. While it is not feasible to adopt a single civil rights assurance form at this time, the Office for Civil Rights will work toward that goal.

8. *Private rights of action.* Several comments urged that the regulation incorporate provision granting beneficiaries a private right of action against recipients under Section 504. To confer such a right is beyond the authority of the executive branch of Government. There is, however, case law holding that such a right exists. Lloyd v. Regional Transportation Authority, 548 F. 2d 1277 (7th Cir. 1977); see Hairston v. Drosick, Civil No. 75-0691 (S.D. W. Va., Jan. 14, 1976); Gurmankin v. Castanzo, 411 F. Supp. 982 (E.D. Pa. 1976); cf. Lau v. Nichols, supra.

9. *Remedial action.* Where there has been a finding of discrimination, 104.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a)(1) include provision of services to persons previously discriminated against, reinstatement of employees and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court action or termination of Federal financial assistance may be imposed.

Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient that exercises control over a noncomplying recipient. Paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action. This paragraph has been revised in response to comments in order to include persons who would have been in the program if discriminatory practices had not existed. Paragraph (a) (1), (2), and (3) have also been amended in response to comments to make plain that, in appropriate cases, remedial action might be required to redress clear violations of the statute itself that occurred before the effective date of this regulation.

10. *Voluntary action.* In 104.6(b), the term "voluntary action" has been substituted for the term "affirmative action" because the use of the latter term led to some confusion. We believe the term "voluntary action" more accurately reflects the purpose of the paragraph. This provision allows action, beyond that required by the regulation, to overcome conditions that led to limited participation by handicapped persons, whether or not the limited participation was caused by any discriminatory actions on the part of the recipient. Several commenters urged that paragraphs (a) and (b) be revised to require remedial action to overcome effects of prior discriminatory practices regardless of whether there has been an express finding of discrimination. The self-evaluation requirement in paragraph (c) accomplishes such the same purpose.

11. *Self-evaluation.* Paragraph (c) requires recipients to conduct a self-evaluation in order to determine whether their policies or practices may discriminate against handicapped persons and to take steps to modify any discriminatory policies and practices and their effects. The Department received many comments approving of the addition to paragraph (c) of a requirement that recipients seek the assistance of handicapped persons in the self-evaluation process. This paragraph has been further amended to require consultation with handicapped persons or organizations representing them before recipients undertake the policy modifications and remedial steps prescribed in paragraphs (c)(ii) and (iii).

Paragraph (c)(2), which sets forth the recordkeeping requirements concerning self-evaluation, now applies only to recipients with fifteen or more employees. This change was made as part of an effort to reduce unnecessary or counterproductive administrative obligations on small recipients. For those recipients required to keep records, the requirements have been made more specific; records must include a list of persons consulted and a description of areas examined, problems identified, and corrective steps taken. Moreover, the records must be made available for public inspection.

12. *Grievance procedure.* Section 104.7 requires recipients with fifteen or more employees to designate an individual responsibility for coordinating its compliance efforts and to adopt a grievance procedure. Two changes were made in the section in response to comment. A general requirement that appropriate due process procedures be followed has been added. It was decided that the details of such procedures could

not at this time be specified because of the varied nature of the persons and entities who must establish the procedures and of the programs to which they apply. A sentence was also added to make clear that grievance procedures are not required to be made available to unsuccessful applicants for employment or to applicants for admission to colleges and universities.

The regulation does not require that grievance procedures be exhausted before recourse is sought from the Department. However, the Secretary believes that it is desirable and efficient in many cases for complainants to seek resolution of their complaints and disputes at the local level and therefore encourages them to use available grievance procedures.

A number of comments asked whether compliance with this section or the notice requirements of 104.8 could be coordinated with comparable action required by the Title IX regulation. The Department encourages such efforts.

13. *Notice.* Section 104.8 (formerly 84.9) sets forth requirements for dissemination of statements of nondiscrimination policy by recipients.

It is important that both handicapped persons and the public at large be aware of the obligations of recipients under Section 504. Both the Department and recipients have responsibilities in this regard. Indeed the Department intends to undertake a major public information effort to inform persons of their rights under Section 504 and this regulation. In 104.8 the Department has sought to impose a clear obligation on major recipients to notify beneficiaries and employees of the requirements of Section 504, without dictating the precise way in which this notice must be given. At the same time, we have avoided imposing requirements on small recipients (those with fewer than fifteen employees) that would create unnecessary and counterproductive paper work burdens on them and unduly stretch the enforcement resources of the Department.

Section 104.8(a), as simplified, requires recipients with fifteen or more employees to take appropriate steps to notify beneficiaries and employees of the recipient's obligations under Section 504. The last sentence of 104.8(a) has been revised to list possible, rather than required, means of notification. Section 104.8(b) requires recipients to include a notification of their policy and nondiscrimination in recruitment and other general information materials.

In response to a number of comments, 104.8 has been revised to delete the requirements of publication in local newspapers, which has proven to be both troublesome and ineffective. Several commenters suggested that notification on separate forms be allowed until present stocks of publications and forms are depleted. The final regulation explicitly allows this method of compliance. The separate form should, however, be included with each significant publication or form that is distributed.

Section 104 which prohibited the use of materials that might give the impression that a recipient excludes qualified handicapped persons from its program, has been deleted. The Department is convinced by the comments that this provision is unnecessary and difficult to apply. The Department encourages recipients, however, to include in their recruitment and other general information materials photographs of handicapped persons and ramps and other features of accessible buildings.

Under new 104.9 the Assistant Secretary may, under certain circumstances, require recipients with fewer than fifteen employees to comply with one or more of these requirements. Thus, if experience shows a need for imposing notice or other requirements on particular recipients or classes of small recipients, the Department is prepared to expand the coverage of these sections.

14. *Inconsistent State laws.* Section 104.10(a) states that compliance with the regulation is not excused by State or local laws limiting the eligibility of qualified handicapped persons to receive services or to practice an occupation. The provision thus applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap.

Paragraph (b) further points out that the presence of limited employment opportunities in a particular profession, does not excuse a recipient from complying with the regulation. Thus, a law school, could not deny admission to a blind applicant because blind lawyers may find it more difficult to find jobs than do nonhandicapped lawyers.

SUBPART B--EMPLOYMENT PRACTICES

Subpart B prescribes requirements for nondiscrimination in the employment practices of recipients of Federal financial assistance administered by the Department. This subpart is consistent with the employment provisions of the

Department's regulation implementing Title IX of the Education Amendments of 1972 (34 CFR, part 106) and the regulation of the Department of Labor under Section 503 of the Rehabilitation Act, which requires certain Federal contractors to take affirmative action in the employment and advancement of qualified handicapped persons. All recipients subject to Title IX are also subject to this regulation. In addition, many recipients subject to this regulation receive Federal procurement contracts in excess of $2,500 and are therefore also subject to Section 503.

15. *Discriminatory practices.* Section 104.11 sets forth general provisions with respect to discrimination in employment. A new paragraph (a)(2) has been added to clarify the employment obligations of recipients that receive Federal funds under Part B of the Education of the Handicapped Act, as amended (EHA). Section 606 of the EHA obligates elementary or secondary school systems that receive EHA funds to take positive steps to employ and advance in employment qualified handicapped persons. This obligation is similar to the nondiscrimination requirement of Section 504 but requires recipients to take additional steps to hire and promote handicapped persons. In enacting Section 606 Congress chose the words "positive steps" instead of "affirmative action" advisedly and did not intend Section 606 to incorporate the types of activities required under Executive Order 11246 (affirmative action on the basis of race, color, sex, or national origin) or under Sections 501 and 503 of the Rehabilitation Act of 1973.

Paragraph (b) of 104.11 sets forth the specific aspects of employment covered by the regulation. Paragraph (c) provides that inconsistent provisions of collective bargaining agreements do not excuse noncompliance.

16. *Reasonable accommodation.* The reasonable accommodation requirement of 104.12 generated a substantial number of comments. The Department remains convinced that its approach is both fair and effective. Moreover, the Department of Labor reports that it has experienced little difficulty in administering the requirements of reasonable accommodation. The provision therefore remains basically unchanged from the proposed regulation.

Section 104.12 requires a recipient to make reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Where a handicapped person is not qualified to perform a particular job, where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination.

Section 104.12(b) lists some of the actions that constitute reasonable accommodation. The list is neither all-inclusive nor meant to suggest that employers must follow all of the actions listed.

Reasonable accommodation includes modification of work schedules, including part-time employment, and job restructuring. Job restructuring may entail shifting nonessential duties to other employees. In other cases, reasonable accommodation may include physical modifications or relocation of particular offices or jobs so that they are in facilities or parts of facilities that are accessible to and usable by handicapped persons. If such accommodations would cause undue hardship to the employer, they need not be made.

Paragraph (c) of this section sets forth the factors that the Office for Civil Rights will consider in determining whether an accommodation necessary to enable an applicant or employee to perform the duties of a job would impose an undue hardship. The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. The reasonable accommodation standard in 104.12 is similar to the obligation imposed upon Federal contractors in the regulation implementing Section 503 of the Rehabilitation Act of 1973, administered by the Department of Labor. Although the wording of the reasonable accommodation provisions of the two regulations is not identical, the obligation that the two regulations impose is the same, and the Federal Government's policy in implementing the two sections will be uniform. The Department adopted the factors listed in paragraph (c) instead of the "business necessity" standard of the Labor regulation because that term seemed inappropriate to the nature of the programs operated by the majority of institutions subject to

this regulation, e.g., public school systems, colleges and universities. The factors listed in paragraph (c) are intended to make the rationale underlying the business necessity standard applicable to an understandable by recipients of ED funds.

17. *Tests and selection criteria.* Revised 104.13(a) prohibits employers from using test or other selection criteria that screen out or tend to screen out handicapped persons unless the test or criterion is shown to be job-related and alternative tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Assistant Secretary to be available. This paragraph is an application of the principle established under Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).

Under the proposed section, a statistical showing of adverse impact on handicapped persons was required to trigger an employer's obligation to show that employment criteria and qualifications relating to handicap were necessary. This requirement was changed because the small number of handicapped persons taking tests would make statistical showings of "disproportionate, adverse effect" difficult and burdensome. Under the altered, more workable provision, once it is shown that an employment test substantially limits the opportunities of handicapped persons, the employer must show the test to be job-related. A recipient is no longer limited to using predictive validity studies as the method for demonstrating that a test or other selection criterion is in fact job-related. Nor, in all cases, are predictive validity studies sufficient to demonstrate that a test or criterion is job-related. In addition, 104.13(a) has been revised to place the burden on the Assistant Secretary, rather than the recipient, to identify alternate tests.

Section 104.13(b) requires that a recipient take into account that some tests and criteria depend upon sensory, manual, or speaking skills that may not themselves be necessary to the job in question but that may make the handicapped person unable to pass the test. The recipient must select and administer tests so as best to ensure that the test will measure the handicapped person's ability to perform on the job rather than the person's ability to see, hear, speak, or perform manual tasks, except, of course, where such skills are the factors that the test purports to measure. For example, a person with a speech impediment may be perfectly qualified for jobs that do not or need not, with reasonable accommodation, require ability to speak clearly. Yet, if given an oral test, the person will be unable to perform in a satisfactory manner. The test results will not, therefore, predict job performance but instead will reflect impaired speech.

18. *Preemployment inquiries.* Section 104.14, concerning preemployment inquiries, generated a large number of comments. Commenters representing handicapped persons strongly favored a ban on preemployment inquiries on the ground that such inquiries are often used to discriminate against handicapped persons and are not necessary to serve any legitimate interests of employers. Some recipients, on the other hand, argued that preemployment inquiries are necessary to determine qualifications of the applicant, safety hazards caused by a particular handicapping condition, and accommodations that might be required.

The Secretary has concluded that a general prohibition of preemployment inquiries is appropriate. However, a sentence has been added to paragraph (a) to make clear that an employer may inquire into an applicant's ability to perform job-related tasks but may not ask if the person has a handicap. For example, an employer may not ask on an employment form if an applicant is visually impaired but may ask if the person has a current driver's license (if that is a necessary qualification for the position in question). Similarly, employers may make inquiries about an applicant's ability to perform a job safely. Thus, an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job without endangering other employees.

Section 104.14(b) allows preemployment inquiries only if they are made in conjunction with required remedial action to correct past discrimination, with voluntary action to overcome past conditions that have limited the participation of handicapped persons, or with obligations under Section 503 of the Rehabilitation Act of 1973. In these instances, paragraph (b) specifies certain safeguards that must be followed by the employer.

Finally, the revised provision allows an employer to condition offers of employment to handicapped persons on the results of medical examinations, so long as the examinations are administered to all employees in a nondiscriminatory manner and the results are treated on a confidential basis.

19. *Specific acts of Discrimination.* Sections 104.15 (recruitment), 104.16 (compensation),

104.17 (job classification and structure) and 104.18 (fringe benefits) have been deleted from the regulation as unnecessarily duplicative of 104.11 (discrimination prohibited). The deletion of these sections in no way changes the substantive obligations of employers subject to this regulation from those set forth in the July 16 proposed regulation. These deletions bring the regulation closer in form to the Department of Labor's Section 503 regulation.

A proposed section, concerning fringe benefits, had allowed for differences in benefits or contributions between handicapped and nonhandicapped persons in situations only where such differences could be justified on an actuarial basis. Section 104.11 simply bars discrimination in providing fringe benefits and does not address the issue of actuarial differences. The Department believes that currently available data and experience do not demonstrate a basis for promulgating a regulation specifically allowing for differences in benefits or contributions.

SUBPART C--PROGRAM ACCESSIBILITY

In general, Subpart C prohibits the exclusion of qualified handicapped persons from federally assisted programs or activities because a recipient's facilities are inaccessible or unusable.

20. *Existing facilities.* Section 104.22 maintains the same standard for nondiscrimination in regard to existing facilities as was included in the proposed regulation. The section states that a recipients program or activity, when viewed in its entirety, must be readily accessible to and usable by handicapped persons. Paragraphs (a) and (b) make clear that a recipient is not required to make each of its existing facilities accessible to handicapped persons if its program as a whole is accessible. Accessibility to the recipient's program or activity may be achieved by a number of means, including redesign of equipment, reassignment of classes or other services to accessible buildings, and making aides available to beneficiaries. In choosing among methods of compliance, recipients are required to give priority consideration to methods that will be consistent with provision of services in the most appropriate integrated setting. Structural changes in existing facilities are required only where there is no other feasible way to make the recipient's program accessible.

Under 104.22, a university does not have to make all of its existing classroom buildings accessible to handicapped students if some of its buildings are already accessible and if it is possible to reschedule or relocate enough classes so as to offer all required courses and a reasonable selection of elective courses in accessible facilities. If sufficient relocation of classes is not possible using existing facilities, enough alterations to ensure program accessibility are required. A university may not exclude a handicapped student from a specifically requested course offering because it is not offered in an accessible location, but it need not make every section of that course accessible.

Commenters representing several institutions of higher education have suggested that it would be appropriate for one postsecondary institution in a geographical area to be made accessible to handicapped persons and for other colleges and universities in that area to participate in that school's program, thereby developing an educational consortium for the postsecondary education of handicapped students. The Department believes that such a consortium, when developed and applied only to handicapped persons, would not constitute compliance with 104.22, but would discriminate against qualified handicapped persons by restricting their choice in selecting institutions of higher education and would, therefore, be inconsistent with the basic objectives of the statute.

Nothing in this regulation, however, should be read as prohibiting institutions from forming consortia for the benefit of all students. Thus, if three colleges decide that it would be cost-efficient for one college to offer biology, the second physics, and the third chemistry to all students at the three colleges, the arrangement would not violate Section 504. On the other hand, it would violate the regulation if the same institutions set up a consortium under which one college undertook to make its biology lab accessible, another its physics lab, and a third its chemistry lab, and under which mobility-impaired handicapped students (but not other students) were required to attend the particular college that is accessible for the desired courses.

Similarly, while a public school district need not make each of its buildings completely accessible, it may not make only one facility or part of a facility accessible if the result is to segregate handicapped students in a single setting.

All recipients that provide health, welfare, or other social services may also comply with 104.22 by delivering services at alternate accessible sites or making home visits. Thus, for example, a pharmacist might arrange to make

home deliveries of drugs. Under revised 104.22(c), small providers of health, welfare, and social services (those with fewer than fifteen employees) may refer a beneficiary to an accessible provider of the desired service, but only if no means of meeting the program accessibility requirement other than a significant alteration in existing facilities is available. The referring recipient has the responsibility of determining that the other provider is in fact accessible and willing to provide the service.

A recent change in the tax law may assist some recipients in meeting their obligations under this section. Under Section 2122 of the Tax Reform Act of 1976, recipients that pay federal income tax are eligible to claim a tax deduction of up to $25,000 for architectural and transportation modifications made to improve accessibility for handicapped persons. See 42 FR 17870 (April 4, 1977), adopting 26 CFR 7.190.

Several commenters expressed concern about the feasibility of compliance with the program accessibility standard. The Secretary believes that the standard is flexible enough to permit recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facilities. Accordingly, the section does not allow for waivers. The Department is ready at all times to provide technical assistance to recipients in meeting their program accessibility responsibilities. For this purpose, the Department is establishing a special technical assistance unit. Recipients are encouraged to call upon the unit staff for advice and guidance both on structural modifications and on other ways of meeting the program accessibility requirement.

Paragraph (d) has been amended to require recipients to make all nonstructural adjustments necessary for meeting the program accessibility standard within sixty days. Only where structural changes in facilities are necessary will a recipient be permitted up to three years to accomplish program accessibility. It should be emphasized that the three-year time period is not a waiting period and that all changes must be accomplished as expeditiously as possible. Further, it is the Department's belief, after consultation with experts in the field, that outside ramps to buildings can be constructed quickly and at relatively low cost. Therefore, it will be expected that such structural additions will be made promptly to comply with 104.22(d).

The regulation continues to provide, as did the proposed version, that a recipient planning to achieve program accessibility by making structural changes must develop a transition plan for such changes within six months of the effective date of the regulation. A number of commenters suggested extending that period to one year. The secretary believes that such an extension is unnecessary and unwise. Planning for any necessary structural changes should be undertaken promptly to ensure that they can be completed within the three-year period. The elements of the transition plan as required by the regulation remain virtually unchanged from the proposal but 104.22(d) now includes a requirement that the recipient make the plan available for public inspection.

Several commenters expressed concern that the program accessibility standard would result in the segregation of handicapped persons in educational institutions. The regulation will not be applied to permit such a result. See 104.4(c)(2)(iv), prohibiting unnecessarily separate treatment; 104.35, requiring that students in elementary and secondary schools be educated in the most integrated setting appropriate to their needs; and new 104.43(d), applying the same standard to postsecondary education.

We have received some comments from organizations of handicapped persons on the subject of requiring, over an extended period of time, a barrier-free environment--that is, requiring the removal of all architectural barriers in existing facilities. The Department has considered these comments but has decided to take no further action at this time concerning these suggestions, believing that such action should only be considered in light of experience in implementing the program accessibility standard.

21. *New construction.* Section 104.23 requires that all new facilities, as well as alterations that could affect access to and use of existing facilities, be designed and constructed in a manner so as to make the facility accessible to and usable by handicapped persons. Section 104.23(a) has been amended so that it applies to each newly constructed facility if the construction was commenced after the effective date of the regulation. The words "if construction has commenced" will be considered to mean "if groundbreaking has taken place." Thus, a recipient will not be required to alter the design of a facility that has progressed beyond groundbreaking prior to the effective date of the regulation.

Paragraph (b) requires certain alterations to conform to the requirement of physical accessibility in paragraph (a). If an alteration is undertaken to a portion of a building the accessibility of which could be improved by the

manner in which the alteration is carried out, the alteration must be made in that manner. Thus, if a doorway or wall is being altered, the door or other wall opening must be made wide enough to accommodate wheelchairs. On the other hand, if the alteration consists of altering ceilings, the provisions of this section are not applicable because this alteration cannot be done in a way that affects the accessibility of that portion of the building. The phrase "to the maximum extent feasible" has been added to allow for the occasional case in which the nature of an existing facility is such as to make it impractical or prohibitively expensive to renovate the building in a manner that results in its being entirely barrier-free. In all such cases, however, the alteration should provide the maximum amount of physical accessibility feasible.

Section 104.23(d) of the proposed regulation, providing for a limited deferral of action concerning facilities that are subject to Section 502 as well as Section 504 of the Act, has been deleted. The Secretary believes that the provision is unnecessary and inappropriate to this regulation. The Department will, however, seek to coordinate enforcement activities under this regulation with those of the Architectural and Transportation Barriers Compliance Board.

SUBPART D--PRESCHOOL, ELEMENTARY, AND SECONDARY EDUCATION

Subpart D sets forth requirements for nondiscrimination in preschool, elementary, secondary, and adult education programs and activities, including secondary vocational education programs. In this context, the term "adult education" refers only to those educational programs and activities for adults that are operated by elementary and secondary schools.

The provisions of Subpart D apply to state and local educational agencies. Although the subpart applies, in general, to both public and private education programs and activities that are federally assisted, 104.32 and 104.33 apply only to public programs and 104.39 applies only to private programs; 104.35 and 104.36 apply both to public programs and to those private programs that include special services for handicapped students.

Subpart B generally conforms to the standards established for the education of handicapped persons in Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972), Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania 344 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), and Lebanks v. Spears, 60, F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Pub. L. 94-142 (the EHA).

The basic requirements common to those cases, to the EHA, and to this regulation are (1) that handicapped persons, regardless of the nature or severity of their handicap, be provided a free appropriate public education, (2) that handicapped students be educated with nonhandicapped students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved handicapped children, (4) that evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students, and (5) that procedural safeguard be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children. These requirements are designed to ensure that no handicapped child is excluded from school on the basis of handicap and, if a recipient demonstrates that placement in a regular educational setting cannot be achieved satisfactorily, that the student is provided with adequate alternative services suited to the student's needs without additional cost to the student's parents or guardian. Thus, a recipient that operates a public school system must either educate handicapped children in its regular program or provide such children with an appropriate alternative education at public expense.

It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart (concerning identification and location, evaluation, and due process procedures). However, the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education.

22. *Location and notification.* Section 104.32 requires public schools to take steps annually to identify and locate handicapped children who are not receiving an education and to publicize to handicapped children and their parents the rights and duties established by Section 504 and this

regulation. This section has been shortened without substantive change.

23. *Free appropriate public education.* Under 104.33(a), a recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word "in" encompasses the concepts of both domicile and actual residence. If a recipient places a child in a program other than its own, it remains financially responsible for the child, whether or not the other program is operated by another recipient or educational agency. Moreover, a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility.

Section 104.33(b) concerns the provision of appropriate educational services to handicapped children. To be appropriate, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of nonhandicapped children are met. An appropriate education could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services). The placement of the child must however, be consistent with the requirements of 104.34 and be suited to his or her educational needs.

The quality of the educational services provided to handicapped students must equal that of the services provided to nonhandicapped students; thus, handicapped student's teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available. The Department is aware that the supply of adequately trained teachers may, at least at the outset of the imposition of this requirement, be insufficient to meet the demand of all recipients. This factor will be considered in determining the appropriateness of the remedy for noncompliance with this section. A new 104.33(b)(2) has been added, which allows this requirement to be met through the full implementation of an individualized education program developed in accordance with the standards of the EHA.

Paragraph (c) of 104.33 sets forth the specific financial obligations of a recipient. If a recipient does not itself provide handicapped persons with the requisite services, it must assume the cost of any alternate placement. If, however, a recipient offers adequate services and if alternate placement is chosen by a student's parent or guardian, the recipient need not assume the cost of the outside services. (If the parent or guardian believes that his or her child cannot be suitably educated in the recipient's program, he or she may make use of the procedures established in 104.36.) Under this paragraph, a recipient's obligation extends beyond the provision of tuition payments in the case of placement outside the regular program. Adequate transportation must also be provided. Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes.

If the recipient places a student, because of his or her handicap, in a program that necessitates his or her being away from home, the payments must also cover room and board and nonmedical care (including custodial and supervisory care). When residential care is necessitated not by the student's handicap but by factors such as the student's home conditions, the recipient is not required to pay the cost of room and board.

Two new sentences have been added to paragraph (c)(1) to make clear that a recipient's financial obligations need not be met solely through its own funds. Recipients may rely on funds from any public or private source including insurers and similar third parties.

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but Section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to 104.33. Section 104.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of 104.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in Section 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

24. *Educational setting.* Section 104.34 prescribes standards for educating handicapped persons with nonhandicapped persons to the maximum extent appropriate to the needs of the handicapped person in question. A handicapped student may be removed from the regular educational setting only where the recipient can show that the needs of the student would, on balance, be served by placement in another setting.

Although under 104.34, the needs of the handicapped person are determinative as to proper placement, it should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by 104.34.

Among the factors to be considered in placing a child is the need to place the child as close to home as possible. A new sentence has been added to paragraph (a) requiring recipients to take this factor into account. As pointed out in several comments, the parents' right under 104.36 to challenge the placement of their child extends not only to placement in special classes or separate schools but also to placement in a distant school and, in particular, to residential placement. An equally appropriate educational program may exist closer to home; this issue may be raised by the parent or guardian under 104.34 and 104.36.

New paragraph (b) specified that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children.

Section 104.34(c) requires that any facilities that are identifiable as being for handicapped students be comparable in quality to other facilities of the recipient. A number of comments objected to this section on the basis that it encourages the creation and maintenance of such facilities. This is not the intent of the provision. A separate facility violates Section 504 unless it is indeed necessary to the provision of an appropriate education to certain handicapped students. In those instances in which such facilities are necessary (as might be the case, for example, for severely retarded persons), this provision requires that the educational services provided be comparable to those provided in the facilities of the recipient that are not identifiable as being for handicapped persons.

25. *Evaluation and placement.* Because the failure to provide handicapped persons with an appropriate education is so frequently the result of misclassification or misplacement, 104.33(b)(1) makes compliance with its provisions contingent upon adherence to certain procedures designed to ensure appropriate classification and placement. These procedures, delineated in 104.35 and 104.36, are concerned with testing and other evaluation methods and with procedural due process rights.

Section 104.35(a) requires that an individual evaluation be conducted before any action is taken with respect either to the initial placement of a handicapped child in a regular or special education program or to any subsequent significant change in that placement. Thus, a full reevaluation is not required every time an adjustment in placement is made. "Any action" includes denials of placement.

Paragraphs (b) and (c) of 104.35 establishes procedures designed to ensure that children are not misclassified, unnecessarily labeled as being handicapped, or incorrectly placed because of inappropriate selection, administration, or interpretation of evaluation materials. This problem has been extensively documented in "Issues in the Classification of Children," a report by the Project on Classification of Exceptional Children, in which the HEW Interagency Task Force participated. The provisions of these paragraphs are aimed primarily at abuses in the placement process that result from misuse of, or undue or misplaced reliance on, standardized scholastic aptitude tests.

Paragraph (b) has been shortened but not substantively changed. The requirement in former subparagraph (1) that recipients provide and administer evaluation materials in the native language of the student has been deleted as unnecessary, since the same requirement already exists under Title VI and is more appropriately covered under that statute. Paragraphs (1) and (2) are, in general, intended to prevent misinterpretation and similar misuse of test scores and, in particular, to avoid undue reliance on general intelligence tests. Subparagraph (3) requires a recipient to administer tests to a student with impaired sensory, manual, or speaking skills in whatever manner is necessary to avoid distortion

of the test results by the impairment. Former subparagraph (4) has been deleted as unnecessarily repetitive of the other provisions of this paragraph.

Paragraph (c) requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized. In particular, it requires that all significant factors relating to the learning process, including adaptive behavior, be considered. (Adaptive behavior is the effectiveness with which the individual meets the standards of personal independence and social responsibility expected of his or her age and cultural group.) Information from all sources must be documented and considered by a group of persons, and the procedure must ensure that the child is placed in the most integrated setting appropriate.

The proposed regulation would have required a complete individual reevaluation of the student each year. The Department has concluded that it is inappropriate in the Section 504 regulation to require full reevaluations on such a rigid schedule. Accordingly, 104.35(c) requires periodic reevaluations and specifies that reevaluations in accordance with the EHA will constitute compliance. The proposed regulation implementing the EHA allows reevaluation at three-year intervals except under certain specified circumstances.

Under 104.36, a recipient must establish a system of due process procedures to be afforded to parents or guardians before the recipient takes any action regarding the identification, evaluation, or educational placement of a person who, because of handicap, needs or is believed to need special education or related services. This section has been revised. Because the due process procedures of the EHA, incorporated by reference in the proposed Section 504 regulation, are inappropriate for some recipients not subject to that Act, the section now specifies minimum necessary procedures: notice, a right to inspect records, an impartial hearing with a right to representation by counsel, and a review procedure. The EHA procedures remain one means of meeting the regulation's due process requirements, however, and are recommended to recipients as a model.

26. *Nonacademic services.* Section 104.37 requires a recipient to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation. Because these services and activities are part of a recipient's education program, they must, in accordance with the provisions of 104.34, be provided in the most integrated setting appropriate.

Revised paragraph (c)(2) does permit separation or differentiation with respect to the provision of physical education and athletics activities, but only if qualified handicapped students are also allowed the opportunity to compete for regular teams or participate in regular activities. Most handicapped students are able to participate in one or more regular physical education and athletics activities.

Finally, the one-year transition period provided in a proposed section was deleted in response to the almost unanimous objection of commenters to that provision.

27. *Preschool and adult education.* Section 104.38 prohibits discrimination on the basis of handicap in preschool and adult education programs. Former paragraph (b), which emphasized that compensatory programs for disadvantaged children are subject to Section 504, has been deleted as unnecessary, since it is comprehended by paragraph (a).

28. *Private education.* Section 104.39 sets forth the requirements applicable to recipients that operate private education programs and activities. The obligations of these recipients have been changed in two significant respects: first, private schools are subject to the evaluation and due process provisions of the subpart only if they operate special education programs; second, under 104.39(b), they may change more for providing services to handicapped students than to nonhandicapped students to the extent that additional charges can be justified by increased costs.

Paragraph (a) of 104.39 is intended to make clear that recipients that operate private education programs and activities are not required to provide an appropriate education to handicapped students with special educational needs if the recipient does not offer programs designed to meet those needs. Thus, a private school that has no program for mentally retarded persons is neither required to admit such a person into its program nor to arrange or pay for the provision of the person's education in another program. A private recipient without a special program for blind students, however, would not be permitted to exclude, on the basis of blindness, a blind applicant who is able to participate in the regular program with minor adjustments in the manner in which the program is normally offered.

COMPLIANCE STATEMENT

TITLE VI, CIVIL RIGHTS ACT OF 1964; THE MODIFIED COURT ORDER, CIVIL ACTION 5281, FEDERAL DISTRICT COURT, EASTERN DISTRICT OF TEXAS, TYLER DIVISION

Reviews of local education agencies pertaining to compliance with Title VI Civil Rights Act of 1964 and with specific requirements of the Modified Court order, Civil Action No. 5281, Federal District Court, Eastern District of Texas, Tyler Division are conducted periodically by staff representatives of the Texas Education Agency. These reviews cover at least the following policies and practices:

(1) acceptance policies on student transfers from other school districts;

(2) operation of school bus routes or runs on a non-segregated basis;

(3) nondiscrimination in extracurricular activities and the use of school facilities;

(4) nondiscriminatory practices in the hiring, assigning, promoting, paying, demoting, reassigning, or dismissing of faculty and staff members who work with children;

(5) enrollment and assignment of students without discrimination on the basis of race, color, or national origin;

(6) nondiscriminatory practices relating to the use of a student's first language; and

(7) evidence of published procedures for hearing complaints and grievances.

In addition to conducting reviews, the Texas Education Agency staff representatives check complaints of discrimination made by a citizen or citizens residing in a school district where it is alleged discriminatory practices have occurred or are occurring.

Where a violation of Title VI of the Civil Rights Act is found, the findings are reported to the Office for Civil Rights, U.S. Department of Education.

If there is a direct violation of the Court Order in Civil Action No. 5281 that cannot be cleared through negotiation, the sanctions required by the Court Order are applied.

TITLE VII, CIVIL RIGHTS ACT OF 1964; EXECUTIVE ORDERS 11246 AND 11375; TITLE IX, 1973 EDUCATION AMENDMENTS; REHABILITATION ACT OF 1973 AS AMENDED; 1974 AMENDMENTS TO THE WAGE-HOUR LAW EXPANDING

THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967; AND VIETNAM ERA VETERANS READJUSTMENT ASSISTANCE ACT OF 1972 AS AMENDED IN 1974.

It is the policy of the Texas Education Agency to comply fully with the nondiscrimination provisions of all federal and state laws and regulations by assuring that no person shall be excluded from consideration for recruitment, selection, appointment, training, promotion, retention, or any other personnel action, or be denied any benefits or participation in any programs or activities which it operates on the grounds of race, religion, color, national origin, sex, handicap, age, or veteran status (except where age, sex, or handicap constitute a bona fide occupational qualification necessary to proper and efficient administration). The Texas Education Agency makes positive efforts to employ and advance in employment all protected groups.

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